LIBRARY

Office-Supreme Court, U.S.
FILED
AUG 30 1961
JAMES R. BROWNING, Clerk

NO. 277

IN THE

Supreme Court of the United States

October Term
1961

G & H TOWING COMPANY, *Petitioner*

versus

EDWIN E. JOHANSSON, KANSAS CITY BRIDGE CO., MERRITT-CHAPMAN & SCOTT CORP., AND PELICAN ISLAND DEVELOPMENT CORP., *Repondents*

ON PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
for the Fifth Circuit

BRIEF OF MARITIME OVERSEAS CORPORATION IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI FILED HEREIN BY G & H TOWING COMPANY, PETITIONER

EASTHAM, WATSON,
DALE & FORNEY
CLARENCE S. EASTHAM
538 Mellie Esperson Building
Houston 2, Texas
Attorneys for Maritime Overseas Corporation

Of Counsel:

CLARENCE S. EASTHAM
ALAN S. DALE

Alpha Law Brief Co., 402 M & M Bldg., Houston 2

SUBJECT INDEX

	PAGE
QUESTIONS PRESENTED FOR REVIEW	2
STATEMENT	7
REASONS FOR NOT GRANTING THE WRIT	11
ARGUMENT	12
I. There was no error in the decisions of the District Court and the Court of Appeals	12
A. The District Court and Court of Appeals were correct in applying the rule of the Bisso Case to the facts here found	12
Sun Oil v. Dalzell was a true pilotage case, where the ship was using her own propulsion and rudder power, and the towing company, therefore, was merely assisting the ship and did not have complete control of the operation	15
In Sun Oil v. Dalzell there was no proof of the existence of a monopoly in favor of the towing company	18
The dropping of an anchor by a vessel without power and maneuverability is not pilotage	21
Summary of the Applicability of the Bisso Rule, and the reasons for distinguishing Sun Oil v. Dalzell	23
B. The District Court and the Court of Appeals were correct in holding petitioner, G & H Towing Co., liable as the employer of Captain Gray for the latter's negligent acts on the principle of respondeat superior	25
II. The opinion of the Court of Appeals is not in conflict with that of any other Court of Appeals or of this Court in any other case	32

PAGE

III. No public interest of importance is here involved 33

IV. Inasmuch as the opinions of the District Court and the Court of Appeals were the result of the application of settled legal principles to fact findings amply supported by the evidence, and not clearly erroneous, there are no questions to be passed on by this Court 34

CONCLUSION 35

CERTIFICATE 36

LIST OF AUTHORITIES

CASES PAGE

Alabama Power Co. v. Ickes (1938), 302 U.S. 464 34

Bisso v. Inland Waterways Corp. (1955), 349 U.S. 85 4, 5, 10, 11, 12, 19, 20, 21, 23

Bisso v. Inland Waterways Corp., 287 F.2d 852, 854 4, 5, 11, 25, 32

Graver Tank and Mfg. Co. v. Linde Air Products Co. (Ind. 1959), 336 U.S. 271 34

People of the State of California v. The Steamship Jules Fribourg (ND Cal.), 1956 A.M.C. 939, 140 F.Supp. 333 25, 26

Publicker Industries, Inc. v. Tugboat Neptune Co., et al. (3 C.C.A. 1948), 1949 A.M.C. 121, 171 F.2d 48 25

Sun Oil Co. v. Dalzell Towing Co. (2 C.C.A. 1932), 55 F.2d 63, aff. 287 U.S. 291 12, 13, 15, 16, 17, 18, 19, 23, 26, 31, 32

The Caspian (E.D. Pa. 1925), 14 F.2d 1006, aff. 14 F.2d 1013 29

The Edward Murray (2 C.C.A. 1922), 278 F. 895 25

The Linseed King (N.Y. 1932), 285 U.S. 502 34

The Niels Finsen (SD NY 1931), 1931 A.M.C. 1014, 52 F.2d 795 17, 25

The Oceanica, 170 F. 893 14, 19

The Steamer Syracuse, 12 Wall. 157, 20 L.Ed. 382 13

The Wash Gray, 277 U.S. 66 14

United States v. Chris Neilson, 349 U.S. 129 13

NO. 277

IN THE

Supreme Court of the United States

October Term
1961

G & H TOWING COMPANY, *Petitioner*
versus
EDWIN E. JOHANSSON, KANSAS CITY BRIDGE CO., MERRITT-CHAPMAN & SCOTT CORP., AND PELICAN ISLAND DEVELOPMENT CORP.,
Repondents

ON PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals for the Fifth Circuit

BRIEF OF MARITIME OVERSEAS CORPORATION IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI FILED HEREIN BY G & H TOWING COMPANY, PETITIONER

To The Honorable, The Chief Justice of The United States And The Associate Justices of The Supreme Court of The United States:

Maritime Overseas Corporation is not named as a respondent in the petition of G & H Towing Company for

Writ of Certiorari. However, inasmuch as the relief prayed for by Petitioner in the prayer of its petition, if granted, would be prejudicial to the position of Maritime Overseas Corporation, it files this opposition thereto, denying jurisdiction, and denying error, and respectfully prays that the petition of G & H Towing Company herein be denied.

Questions Presented For Review

It is the position of Maritime Overseas Corporation that there are no questions properly presented for this Court's review in this case, because the decisions of the District Court and the Court of Appeals were the result of the application of well settled legal principles to facts found on competent evidence. However, if there are any questions to be passed upon by this Court, we certainly do not agree that they are correctly stated in the petition, and those purported questions are therefore challenged as follows:

I.

This case does not present, as Petitioner contends in Article I of its petition, the question of whether a "pilotage" clause of the type generally used in American harbors is lawful. In the first place, the pilotage clause here involved was not of the type generally used in American harbors because it was not restricted to those vessels which were maneuvering under their own power in control of their own crews. Morever, this was not a case, as Petitioner states in its petition, where an ocean going vessel with her master in command upon her bridge and with a full crew at their stations was being shifted by tugs. Instead, this was a case where a dead ship, the main engines of which were dismantled and inoperative, and the helm of which was lashed, was being towed from one berth to another within

the confines of Galveston harbor solely by tug power, and under the command of a towing company employee who was furnished by the towing company on its own initiative, not at the request of the vessel to be towed, to direct the shifting operation. This towing company employee, Captain Gray, was on the bridge of the ship actually directing the movement, and although the master of the ship was also on the bridge he was not commanding, and in fact could not command the operation as he was unable to direct the tugs and unable to move his ship in any direction by the use of her own rudder and wheel. There was not, as Petitioner states, a full crew at their stations; there were no engine room personnel at their stations because the engines were inoperable; there was no helmsman at the wheel because the helm was lashed amidships; there was no mate at the engine order telegraph because it was secured. Although Captain Gray was the holder of a pilot's license from the Federal government, he was not a state licensed bar pilot or a member of the Galveston Pilots Association, but was simply the employee of the towing company furnished by the latter to conduct the towing operation. Maritime Overseas Corporation made no contract with Captain Gray to pilot the M/V "Har Canaan", and they paid him no fee for his services. Neither is it true, as is stated in Article I of the petition, that the master ordered the ship's crew to drop the vessel's anchor. It was found as a fact by the District Court in no less than three separate findings (See Findings of Fact No. 17, 18 and 21, R. 883 and 884) that Captain Gray, not the master, issued the order to drop the anchor, and this was an act performed in the course of the towage operation.

While it is true, as Petitioner states, that the towage contract contained no words attempting to relieve the

tugs or their owners from liability for negligent towage, the contract did purport or attempt to relieve the towing company from liability for the negligence of a pilot. Starting with this premise, the towing company then attempts to denominate the employee furnished by it to conduct a towing operation a "pilot" and to denominate the towage service performed "pilotage", and to thereby do by indirection what it could not do directly, that is, to relieve itself from liability for negligent towage. Thus, the question, if any, is not whether Your Honors held in *Bisso v. Inland Waterways Corporation* (1955), 349 U.S. 85, that pilotage clause was invalid, but whether the Courts below in the instant case were correct in holding in accordance with the rule announced by Your Honors in the *Bisso* decision, that a clause which would in effect exempt a towing company from liability for the negligence of its towing employees was invalid and unenforceable regardless of the fact that the towing company attempted to denominate the service which it performed "pilotage" and regardless of the fact that the towing company attempted to denominate its employee a "pilot". The question, if any, we submit was laid to rest by the decision of the Court of Appeals, 287 F. 2d 852 at P. 854 where it was said:

> "Of this, we think it sufficient to say that we agree: with the District Judge's conclusion that the Libellants, strangers to the contract, cannot, of course, be held bound or in any way affected, by its terms; and also with his conclusions with respect to actions over for exoneration or indemnity that Appellants are bound and precluded by the decision and holding in *Bisso vs. Inland Waterways Corp.*, 349 U.S. 85, 75 S. Ct. 629, 99 L. Ed. 911, that such a clause is invalid. In addition, we think it clear, that respondents' reliance on *Sun Oil Co. vs. Dalzell Towing Co.*, 287 U.S. 291, 53

> S. Ct. 135, 77 L. Ed. 311, will not at all do here, both because of the decision in the *Bisso* case, which, on full consideration, rejected the *Dalzell* case as authority for the position here taken, and because the *Dalzell* case dealt with pilotage in its real sense of service rendered by publicly licensed involuntary or compulsory pilots, and Gray in this case was not such a pilot. Though called a pilot, he was merely the person in direct command with respect to a dead ship towing operation who, as such, conducted the operation by coming on board. Look at it as one will, nothing more can be made of this case than that it is a mere case of a towing service furnished by G & H Towing Company and performed by its port captain, who, though denominated 'pilot' was merely the one in charge of a dead ship towing operation who conducted it by coming on board the dead ship, and the effort to limit the liability of the towing company for the acts of those furnished by it to conduct the towing maneuver must fail here, just as it failed in the *Bisso* case, and the judgment denying effect to the invoked clause of the contract must be affirmed."

None of the cases cited by the Petitioner in Article I of its brief for the proposition that a pilotage clause is valid is in point in this case, because all of those cases involve situations in which the vessels were actually being controlled by their own crews through the use of their own propulsion and steering machinery and were merely being *assisted* by the pilot and the tugs. They were not cases, as was the one at bar, wherein a ship, without the use of her own propulsion machinery or rudder, and having no control over her own movements, was being moved entirely by tug power under the direction of a towing company employee. Thus, we repeat that the question is not whether Your Honors held in *Bisso v. Inland Waterways Corp.*, supra,

that a *pilotage* clause is invalid, but whether the Courts below were correct in holding, in accordance with the *Bisso* decision, that such a *pilotage* clause cannot be enforced in a case where it has been found as a matter of fact that *towage* and not pilotage was involved.

II.

We disagree with the Petitioner where it states in Article II of its petition that the question is here presented whether the Courts below were correct in holding that Petitioner, G & H Towing Co., was liable for the negligence of the pilot in the dropping of the anchor, or whether the pilot was an independent contractor and a borrowed servant of the ship for whose acts the Petitioner towing company was not responsible. No such question is presented by the record in this case. Initially, it must be repeated that the Courts below did not find that Captain Gray was a pilot as stated by Petitioner. To the contrary, they found that he was no more than a full time, regular *towing* company employee supplied by his employer, G & H Towing Co., to be in charge of the overall *towing* operation. He was not a state licensed bar pilot, and was not a member of the Galveston Pilots Association. There was no contract of employment between the operators of the M/V "Har Canaan" and Captain Gray for the latter to act as pilot aboard the ship, and no pilotage fee was paid by the ship operators to Captain Gray. In fact, there was no contact whatsoever between Maritime Overseas Corporation and Captain Gray until the latter appeared aboard the M/V "Har Canaan" on instructions from his employer, G & H Towing Co. This was not a case, as petitioner states, wherein the ship was being maneuvered under the command of her own master and crew through the use of her own

propulsion and rudder power, and merely being assisted by tugs and a pilot, but was one in which the entire movement of the ship was within the sole control of the towing company through the latter's tugs and through its employee, Captain Gray. Accordingly those true pilotage cases cited by Petitioner are not in point here and no legitimate question of Captain Gray's being an independent contractor or a borrowed servant is properly presented by the record.

Additionally, the Court's attention is invited to the fact that Petitioner here again erroneously states that the record shows that the master gave the order to drop the anchor and that Captain Gray, the towing company employee, was acting only in an advisory capacity. To the contrary, the District Court found in no less than three separate findings (Findings of Fact No. 17, 18 and 21, R. 883, 884) that Captain Gray, not the master, issued the order to drop the anchor, and further, that Captain Gray, not the master, was conning the M/V "Har Canaan" (Finding of Fact No. 13, R. 882).

Statement

The incidents giving rise to this litigation occurred on March 21, 1958. At that time, the M/V "Har Canaan", a foreign flag ship, was undergoing repairs on her main engine, which was partly dismantled and inoperative. Her wheel was lashed with her rudder amidship and her engine telegraph was secured. (R. 667, 671). Her master and third mate were on her bridge and her chief officer and seamen were by her anchors. Her crew was aboard, but under the circumstances were little more than passengers. The ship was scheduled to be shifted from Pier 15 to the Sunset Grain Elevator at Slip A within the Port of Galveston,

Texas (Finding of Fact No. 8, R. 879). It was therefore necessary for this shift to be made entirely by tug power (R. 671). Accordingly, Maritime Overseas Corporation's Galveston agent called the office of Petitioner, G & H Towing Company, at Pier 10, Galveston, advised the said G & H Towing Company, which was the only towing company furnishing harbor tugs in the Port of Galveston, Texas (Finding of Fact No. 10, R. 880), that the "Har Canaan" should be shifted at 12:00 noon as a "dead ship" from Pier 15 to Sunset Elevator, and asked the said G & H Towing Company to handle the shifting operation. The three tugs, directions as to their positioning, all maneuvers, and the entire operation were under the sole control of Petitioner, G & H Towing Co., and Maritime Overseas Corporation was interested only in the ultimate result of having the ship berthed at Sunset Grain Elevator. The anchor of this particular vessel is dropped by merely releasing a brake at the electric anchor windlass and its weight carries it out. The ship's master was an infrequent caller at the port, a stranger to the area of the Slip A vicinity, had no knowledge about the pipelines in the vicinity, and had no pilot's license for the port. The ship's agent, in notifying G & H Towing Company when to shift the M/V "Har Canaan", did not specify the number or type of tugs that were to be supplied for the operation, nor did he request that G & H Towing Company furnish a pilot for the operation (R. 726). In response to this telephone conversation, G & H Towing Company furnished the three tugs that moved the ship, and also sent along, on its own initiative, and for its own benefit and convenience, its port captain and so-called "dead ship" pilot, Captain Emmett Gray, a regular employee of G & H Towing Company, to direct the movement of the flotilla

(R. 162). The three tugs so furnished by G & H Towing Company, under the direction of Captain Gray, its employee, supplied the sole motive, maneuvering, navigating and directional power for the movement of the ship throughout the entire operation, and the said Captain Gray gave all orders during the shifting operation (R. 671, 673, 674). We call attention, at this point, to our quotation from the opinion of the Court of Appeals on Page 4 hereof.

As the flotilla was approaching, and/or entering Slip A, Captain Gray, the employee furnished by G & H Towing Company to be in charge of the overall towing operation, gave the order to drop the ship's port anchor (Findings of Fact Nos. 14 and 17, R. 882 and 883, respectively). The anchor brake of the M/V "Har Canaan" was released and the anchor accordingly was dropped as directed, and resulted, according to the findings of the District Court, undisturbed by the Court of Appeals, in damage to one or both of two sub-aqueous pipelines in which the named respondents herein were interested.

The District Court found, upon abundant credible evidence, that Captain Emmett Gray was acting as the employee of Petitioner, G & H Towing Company, at all times material hereto, and was not a loaned servant to the vessel or her operators (Finding of Fact No. 20, R. 884); that the master of the M/V "Har Canaan" was not negligent in failing to intervene or displace Captain Gray (Finding of Fact No. 21, R. 884), and that neither he nor any other officer or member of the crew of the M/V "Har Canaan" was in any way negligent (Finding of Fact No. 22, R. 884). The Court concluded that G & H Towing Company was liable for the negligence of Captain Gray as its employee (Conclusion of Law No. 2, R. 885), and that the M/V "Har

Canaan" was liable "in rem" for the negligence of Captain Gray because he was lawfully in charge of her. No in personam liability was found against Maritime Overseas Corporation, claimant of the M/V "Har Canaan". The District Court awarded indemnity to Maritime Overseas Corporation, as claimant of the M/V "Har Canaan", against Captain Gray and his employer, G & H Towing Company for the "in rem" liability imposed against the M/V "Har Canaan" by reason of the negligent act of Captain Gray (Conclusion of Law No. 7, R. 897); and held that the so-called "pilotage" clause in the contract between Bay-Houston Towing Co. and Maritime Overseas Corp. did not shift the responsibility for Gray's negligence from Gray and G & H to Maritime Overseas Corporation; that this was in fact a towage operation, not a pilotage operation, and that such release towing agreements and recitations of employer-employee relationship when none in fact existed had been held by this Court to be invalid as against public policy in *William A. Bisso v. Inland Waterways Corporation*, supra. Finally, the District Court concluded that even if the so-called pilotage clause were not void under the *Bisso* decision, it would not afford to G & H Towing Co. or to Captain Gray a basis for indemnity against Maritime Overseas Corporation because it was not sufficiently broad in terms to encompass that remedy (R. 873).

The Fifth Circuit Court of Appeals affirmed the holding of the trial court that the negligence of Captain Gray alone was responsible for the damages in the case, and that Maritime Overseas Corporation, whose vessel, the M/V "Har Canaan", was held liable in rem solely because of the negligence of Captain Gray, was entitled to indemnity against

the said Captain Gray and against his employer, G & H Towing Company for the in rem liability imposed against the ship by reason of Gray's negligence. The Court of Appeals specifically approved the District Court's holding that the so-called pilotage clause was inapplicable and as a defense was invalid, and did not suffice to impose liability against Maritime Overseas Corporation for the negligence of Captain Gray, because this was, under the proven facts, a towage situation, not a pilotage situation, and the exculpatory clause, being an attempt to release a towing company from liability for its own negligence, was void as against public policy under the holding of this Court in *William A. Bisso v. Inland Waterways Corporation*, supra. (Please see the opinion of the Court of Appeals at 287 F. 2d 852.)

Reasons For Not Granting The Writ

Your Honors should refuse to grant a writ of certiorari in this cause for the following reasons:

1. There was no error in the decisions of the District Court and the Court of Appeals.

2. The opinion of the Court of Appeals is not in conflict with that of any other Court of Appeals or with this Court in any other case.

3. No public interest of importance is here involved.

4. Inasmuch as the opinions of the District Court and the Court of Appeals were the result of the application of settled legal principles to fact findings initially made by the District Court on ample evidence, which fact findings were approved by the Court of Appeals as not clearly erroneous; there are no questions to be passed on by this Court.

ARGUMENT

I.

There Was No Error in the Decisions of the District Court and the Court of Appeals

A. The District Court and Court of Appeals were correct in applying the rule of the Bisso Case to the facts here found.

Petitioner assails the holdings of the District Court and the Court of Appeals for failing to apply certain authorities upholding pilotage clauses to the case at bar. However, Petitioner fails to recognize, or recognizing, insists on ignoring the fact that *this situation was found, on competent evidence, by the District Judge, to be one of towage, rather than pilotage*, and this finding was specifically approved by the Court of Appeals. Petitioner apparently is contending that since it called its employee, Captain Gray, a "pilot", called the job which he was performing "pilotage", and called the exculpatory clause in the contract a "pilotage" clause, that pilotage authorities should have been applied in the case, in spite of the fact that the ship had no propulsion or maneuvering power and the Court found the facts to be that such pilotage as is mentioned in Petitioner's authorities was not here involved. It is submitted that the District Court and the Court of Appeals were eminently correct in applying to the facts of this case the holding of this Court in *Bisso v. Inland Waterways Corporation*, supra, and in distinguishing *Sun Oil Co. v. Dalzell Towing Co.* (2 C.C.A. 1932) 55 F. 2d 63, aff'd. 287 U.S. 291, because the former involved *towage*, and thus was a direct precedent, and the latter involved *pilotage* and thus

was not in point. We are unable to find a case in American Jurisprudence holding that a so-called pilotage clause, such as the one here involved, was valid and enforceable under the facts here found by the District Judge on the proofs presented.

The flaw in Petitioner's argument could not be more clearly defined than it was in the words of Judge Joseph Hutcheson, speaking for the Fifth Circuit Court of Appeals in its unanimous opinion in this case where he stated in substance that no matter how one looked at the case, nothing more could be made of it than a mere case of a towing service furnished by G & H and performed by its port captain who, though denominated "pilot", was merely the one in charge of a dead ship towing operation who conducted it by coming on board the dead ship. (For the text of Judge Hutcheson's remarks on this subject the Court is referred to Page 4 of this brief where they are quoted in full).

Thus, while it may be true as Petitioner states that it has been held in *Sun Oil Co. v. Dalzell Towing Co.*, supra, and *United States v. Chris Neilson*, 349 U.S. 129, and many other cases that "pilotage" clauses are valid under proper circumstances, it does not follow that a "pilotage" clause will be given effect to enable one party to escape the consequences of his own negligence when it has been found as a matter of fact on competent evidence that *towage and not pilotage* was involved. The proposition that a tower such as is mentioned in the *Bisso* case may not validly contract against liability for its own negligence has long been a part of the judicially created admiralty law. This rule was first established by this Court in 1871 in *The Steamer Syracuse*, 12 Wall 157, 20 L. Ed. 382. There-

after, there were some departures from the rule, notably that of the Second Circuit in *The Oceanica*, 170 F. 893, but when the question was next presented to this Court in 1928 in *The Wash Gray*, 277 U.S. 66, this Court emphatically approved the language and holding of *The Syracuse* and repudiated the holding of *The Oceanica*. In 1955, in the *Bisso* case, this Court again considered a release from liability clause in a towage contract. In the *Bisso* case, the Petitioner's barge, while being towed in the Mississippi River by the Respondent's Tug "Cairo", collided with a bridge pier and sank. At the time, the barge had no propulsion power or steering apparatus; her navigation and maneuvers were in complete control of the Tug "Cairo", her master and crew, whose negligence caused the collision. Consequently, Respondent, owner of the Tug "Cairo", would have been liable to pay Petitioner's damages unless relieved of liability by certain clauses in the contract. One of the clauses in question provided that the towing to be performed should be at the sole risk of the tow, and the second clause provided that the masters, crews, and employees of the Tug "Cairo" and her owners should be in the performance of the service become and be the servants of the tow. This Court held both clauses invalid and stated that the authorities strongly pointed to the existence of a judicial rule, based on public policy invalidating contracts releasing towers from all liability for their negligence. It was further stated that the two main reasons for the creation and application of the rule have been (1) to discourage negligence by making wrongdoers pay damages, and (2) to protect those in need of goods or services from being overreached by others who have power to drive hard bargains. Referring to the fiction of the release clause

whereby the tower sought to make his own employees the employees of the tow, this Court stated at Page 95, "The rule against contractual exemption of a towboat from responsibility for its own negligence cannot be defeated by the simple expedient of providing in a contract that all employees of a towboat shall be employees of the towed vessel when the latter 'employment' is purely a fiction."

As clearly illustrated by the *Bisso* opinion, the District Court and the Court of Appeals correctly distinguished the *Sun Oil v. Dalzell* case from the case at bar in the following two vital particulars: (1) in *Sun Oil v. Dalzell*, the ship with her own crew was using her own propulsion and rudder power, thereby retaining control of her own movements, and producing a "pilotage" situation; and (2) in *Sun Oil v. Dalzell*, there was no proof of or consideration of a monopoly in favor of the towing company. These two distinctions merit special emphasis here:

> ***Sun Oil v. Dalzell was a true pilotage case, where the ship was using her own propulsion and rudder power, and the towing company, therefore, was merely assisting the ship and did not have complete control of the operation.***

It is, of course, plain from the following language in the *Bisso* opinion (Page 94), that one of the Court's reasons, if not the overriding reason, for invalidating the exculpatory clause in that case was the fact that the vessel in tow had no propulsion or steering power of her own, or, in other words, that it was a towage case:

> " * * * It is one thing to permit a company to exempt itself from liability for the negligence of a

> licensed pilot navigating another company's vessel *on that vessel's own power.* That was the Sun Oil case. It is quite a different thing, however, to permit a towing company to exempt itself by contract from all liability for its own employee's negligent towage of a vessel." (Emphasis supplied)

Similarly, in *Sun Oil v. Dalzell,* supra, relied on by Petitioner, this Court in affirming the Court of Appeals which affirmed the District Court which had found that the ship under her own power and maneuverability was being "assisted" by tugs clearly demonstrated that the fact that the Sun Oil vessel *was* using her own propelling power, and was therefore a pilotage case, was a controlling factor in the result. This Court's opinion therein reads in part as follows:

> " * * * It was not shown that Respondent was to have or at any time did have control of the tanker or that it agreed or undertook to do more than to *furnish tugs to assist her while using her own propelling power.*" (Emphasis supplied)

The distinction in the cases lies in the source of control. In *Sun Oil v. Dalzell,* it was found that the ship, having her own propelling and rudder power, retained control of her own movements, and was merely being assisted by the tugs and pilot, and the pilotage clause was held to be valid because it was in fact a pilotage case. In the instant case, it was found as a fact on competent evidence (Finding of Fact No. 13, R. 882), that the M/V "Har Canaan" had no propulsion or maneuvering power and that her helm was lashed so that she had no rudder or steering power. As the master of the M/V "Har Canaan" was un-

able to command the tug (R. 715), and as his ship had no power or maneuverability, neither he nor his crew attempted to, nor could they, nor did they move the ship forward, backward, or to port or starboard. The facts have been found that the entire navigation, maneuvering and movement of the ship was within the complete control of the towing company through its tugs and its regular employee, Captain Emmett Gray, who, as previously pointed out, were exercising actual control of the navigation and maneuvering at the time of the accident, and who remained the servants of the towing company throughout the entire operation. These facts are clearly distinguishable from those in the *Sun Oil v. Dalzell* case, and all others cited by Petitioner, where the ship was using or had available for use her own maneuvering, propulsion and rudder power, and was directing her own maneuvers and navigation and was merely being assisted by the tugs. The facts in the instant case being very closely akin to those in the *Bisso* case, the result was properly held to be governed by the decision therein.

It is of particular significance that all of the cases cited in Petitioner's brief, which uphold pilotage clauses, are cases of true pilotage, where the vessel being assisted was using, or had available for use, her own propulsion and rudder power; indeed, in all of those cases which we have found where litigation over a so-called pilotage clause has arisen, the clause itself has specified that it applied only when the vessel being assisted was using or had available for use her own propulsion power. In the *Niels Finsen*, (SD NY 1931) 1931 A.M.C. 1014, 52 F. 2d 795, the Court took particular note of this wording in the contract, saying:

> "Does the 'pilotage' change these legal consequences? The purpose of it is, of course, to shield the towing company from liability for the acts of its representative when the latter boards a vessel, *but only, it may be observed, in cases where the vessel is making use of its own propelling power.*" (Emphasis supplied)

The reason for making the distinction between those cases wherein the vessel is making use of her own propulsion and rudder power (pilotage cases) and those wherein she has no propulsion or rudder power (towage cases) is clearly supported by sound public policy; in the one case she has the capacity to extricate herself from situations of peril; in the other case, (as the one at bar), the fate of the vessel in tow is entirely within the control of the towing company through its tugs, their crews, and its so-called dead ship pilot, all of whom are its employees.

The rule of *Sun Oil v. Dalzell*, and similar cases, should be strictly confined to the particular fact situation there involved, as it upholds an exculpatory clause which, historically, are strictly construed by the Courts.

In Sun Oil v. Dalzell there was no proof of the existence of a monopoly in favor of the towing company.

Sun Oil v. Dalzell, as heretofore stated, is distinguishable from the *Bisso* case, and from the instant case by the fact that in the former there was no monopoly involved, whereas in the instant case, as in the *Bisso* case, it was definitely proven that the towing company enjoyed a monopoly. In commenting upon the absence of a monopoly in *Sun Oil v. Dalzell*, this Court said:

> "Respondents had no exclusive privilege or monopoly in respect to the services that petitioner desired to have performed for its tanker. And petitioner was under no compulsion to accept any terms of Respondents' pilotage clause. There is nothing to suggest that the parties were not on equal footing or that they did not deal at arm's length."

Evidently, therefore, this Court left open the validity of the clauses in cases where the parties are not on an equal footing or capable of dealing at arm's length. *Sun Oil v. Dalzell* was decided some 23 years prior to the *Bisso* case, and in the latter, when confronted with an exculpatory clause, this Court specifically struck it down as being against public policy, and expressly stated as one of the reasons for the decision that it was "to protect those in need of goods or services from being overreached by others who have power to drive hard bargains." Mr. Justice Douglas, in his concurring opinion (Page 96) in the *Bisso* case, emphasized the point by quoting with approval the words of Judge Coxe in *The Oceanica, supra,* as follows:

> "It ought to be against public policy to permit a vessel to contract against her own fault. To allow her to do so begets recklessness, carelessness, and neglect. The same reasons for prohibiting such a contract in the case of common carriers apply, though not, perhaps, to the same extent, in the case of a towage contract. *In both cases the design is to provent those who have the absolute control of another's property from extorting an agreement that they may neglect all reasonable precaution to preserve it.*" (Emphasis supplied)

And again, Mr. Justice Black, speaking for the majority in the *Bisso* case, (Page 91) said:

> " * * * And increased maritime traffic of today makes it not less but more important that vessels in American ports be able to obtain towage free of monopolistic compulsions."

The Trial Court (Finding of Fact No. 10, R. 880) found the following facts with respect to the status of Petitioner, G & H Towing Co., all of which were clearly supported by the evidence: That the only towing companies offering tug service for shifting ocean going vessels in the Port of Galveston at the time in question were Bay-Houston Towing Company, Sudeman & Young Towing Company, and Intracoastal Towing & Transportation Company; that the services which were available to the owners and operators of ocean going vessels in the Port of Galveston from the three "owning companies" were identical; that this came about in that the three "owning companies" did not operate their own tugs, but all three chartered, bareboat, their tugs to G & H Towing Co., Petitioner, an operating company, which was jointly owned by the three "owning companies"; that in carrying out the orders for towing service, G & H Towing Company would use the tugs which were most readily available and convenient without regard to the ownership, and regardless of which of the three "owning companies" may have had the contract with the vessel to be towed; that the contracts between the "owning companies" and the vessels (or their owners or charterers) expressly allowed for performance in this manner; that the contracts offered by the three "owning companies" were identical in terms, and upon a single printed form; that the rates were the same, save for an exclusive contract a ten percent reduction was allowed.

The evidence showed and it was found that any so-called competition between the three "owning companies" in the port of Galveston was purely a fiction. The only towing services available in the Port of Galveston were offered by Petitioner, G & H Towing Co., and they involved the same boats, the same rates, the same crews, the same so-called dead ship pilot, and the same contractual conditions (R. 792, 793, 794, 796, 801, 802). It was, therefore, crystal clear that the three "owning companies" and their wholly owned operating company, G & H Towing Co., effectively monopolized the harbor towing business in the Port of Galveston, and that Maritime Overseas Corporation had no freedom to choose a type of contract without such exculpatory provisions. This was the exact situation which this Court in the *Bisso* case was endeavoring to guard against. The steamship companies regularly doing business in the Port of Galveston were required either to submit to this monopoly, and the harsh terms and conditions it exacted, or do without harbor towing services. The latter they could not do, and the former the District Court, with the subsequent approval of the Court of Appeals, correctly held the prevailing authorities did not compel them to do.

The dropping of an anchor by a vessel without power and maneuverability is not pilotage.

Petitioner attempts here, as it did in the District Court and the Court of Appeals, to distinguish this case from the *Bisso* case by making the contention that the negligent act here was one of pilotage rather than towage. It is, of course, clear that the validity of the exculpatory clause here involved cannot depend upon the nature of the par-

ticular negligent act resulting in the damages, but must depend solely upon the general nature of the overall operation. In this instance, the Court has finally determined, on ample evidence, that the case was one of towage and therefore, any act of negligence committed by any employee of the towing company necessarily was one committed in the course of the towage operation. Moreover, reason does not support the contention that the dropping of an anchor is an act of pilotage rather than towage; barges and non-self propelled vessels which are normally towed in American waters today are equipped with anchors available for use, and certainly there is nothing unusual about a tow being anchored during the course of a towage operation. Anchoring a tow does not change its status as a towed vessel. The mere fact that the anchor was on the tow itself, which in many instances is a requisite to seaworthiness, does not make it any less a part of the overall towing job. The important factor in distinguishing between towage and pilotage is that of the location of control: in the former the tow has no propulsion or rudder power, and her entire navigation and management are under the control of the towing company through the latter's employees; in a pilotage situation the vessel has the use of her own propulsion power and steering gear, thereby retaining control of her own movement, and the towing company merely assists that movement.

Petitioner makes the contention that Maritime Overseas Corp. was not required to sign the contract containing the exculpatory clause in order to obtain tug service in the port of Galveston, Texas. We feel that the findings of the Court on competent evidence against this contention has

put it at rest, it having found that Maritime Overseas Corp. had no freedom of choice in the type of towing contract offered, but was required to accept a contract with such exculpatory provisions if in fact it was to secure the tugs to move its ship (Conclusions of Law, R. 886). This finding was based upon well supported evidence (R. 793). Whether a ten percent reduction was allowed in the rate or not (for signing an exclusive contract), any contract under which petitioner furnished tugs to move a vessel contained the same exculpatory provision, and no other contract was available because Petitioner had a monopoly of the harbor towing business in the Port of Galveston.

Summary of the Applicability of the Bisso Rule, and the Reasons for Distinguishing Sun Oil v. Dalzell.

In summarizing the reasons for applying the rule of the *Bisso* case to the facts found in the case at bar, and distinguishing *Sun Oil v. Dalzell*, and related opinions, we cannot improve upon the words of the District Judge found in his Conclusions of Law (R. 885, 886), where he said:

> "In considering the question of liability over between the various respondents, however, the validity of the so-called 'pilotage clause' (Finding No. 11) is placed at issue.
>
> Maritime Overseas contends such provision is void, as contrary to public policy, relying primarily on *Bisso vs. Inland Waterways Corp.*, 349 U.S. 85, and related opinions immediately following. Respondents G & H Towing and Captain Gray in supporting the

validity of the exculpatory provisions rely primarily on *Sun Oil Co. v. Dalzell Co., Inc.*, 287 U.S. 291.

Under the facts found above, in my judgment, *Bisso* is controlling, by reason of the following circumstances, which I consider to have been stressed by the Court; (a) the vessel was being moved entirely under the power of the furnished tugs, and without power or control of her own; and (b) by reason of the monopolistic situation which prevailed in the vicinity of Galveston harbor whereby a vessel had no freedom of choice in the type of towing contract offered, but must accept a contract with such exculpatory provisions if in fact it was to secure the assistance of tugs in its movement. Here, as in *Bisso*, the vessel was under complete control of Captain Gray, as an employee of the towing company, and such towing company did 'have power to drive hard bargains'.

The instant case is distinguished from *Dalzell* in these same particulars, for there the Court points out (a) 'it was not shown that Respondent was to have or at any time did have control of the tanker or that it agreed or undertook to do more than to furnish tugs to assist her while using her own propelling power.'; and (b) 'Respondent had no exclusive privilege or monopoly in respect to the service that Petitioner desired to have performed for its tanker. . . . There is nothing to suggest that the parties were not on equal footing or that they did not deal at arm's length."

It is, therefore, respectfully submitted that the decisions of the District Court and Court of Appeals, holding under the facts of this case that the so-called pilotage clause did not exculpate Petitioners, are entirely in accord with the settled American maritime law governing in circumstances such as these.

B. The District Court and the Court of Appeals were correct in holding petitioner, G & H Towing Co., liable as the employer of Captain Gray for the latter's negligent acts on the principle of Respondeat Superior.

Petitioner complains in Article II of its argument because the Court of Appeals held it, the towing company, liable as the employer of Captain Gray for the latter's negligent acts. Here again, Petitioner's complaint is predicated upon the contention that Gray was a pilot, and here again this contention must fail because the Court found on competent evidence that he was not a pilot as that term is commonly used and understood in referring to pilots on self propelled vessels being assisted, but merely the towing company employee who was in charge of the overall towing operation (Please see the opinion of the Court of Appeals, 287 F. 2d 852 at P. 854).

The concept that a towing company employee who goes aboard a ship to direct the movement of that ship by one or more of his employer's tugs can remain, throughout the operation, the employee of the towing company so as to bind the latter by his negligent acts, is not a new one. See the *Edward G. Murray* (2 C.C.A. 1922), 278 F. 895. Moreover, as to third parties who are not parties to any contract containing an exculpatory clause, the towing company employee's employment status remains the same even where he is actually performing pilotage service on a ship having the use of her own propulsion and rudder power. See *Publicker Industries, Inc. v. Tugboat Neptune Company, et al.* (3 C.C.A. 1948), 1949 A.M.C. 121, 171 F. 2d 48; *The Niels Finsen*, supra; and *People of the State of California v. The Steamship Jules Fribourg*, (N.D. Cal.),

1956 A.M.C. 939, 140 F. Supp. 333. (The Court's attention is invited to the fact that the Jules Fribourg case supports the District Court's holding that Gray remained the employee of the towing company. That case would not preclude indemnity to Maritime Overseas Corporation against Petitioner. It is distinguishable from the case at bar on the facts in that the Jules Fribourg was found to be using for navigation and maneuvering her own motive and rudder power. In that case there was no finding by the Court that towage was involved. In the case at bar, the ship was without power, self-propulsion, rudder or self maneuverability, and she was being navigated and maneuvered dead. She was entirely under the control of the towing company through its tugs, with its employee in charge, similar to the facts and within the holding of this Court in the *Bisso* case.

The District Court, in fiindings well supported by the evidence affirmed on appeal, correctly held that Emmett Gray, as a matter of fact, was an employee of Petitioner, G & H Towing Company, throughout the entire towing operation. (See Findings of Fact Nos. 12 and 20, R. 881 and 884, respectively). Thus, as between Gray's employer, G & H Towing Company, and the Respondents in this case, G & H Towing Co. was properly held to be liable for the damages resulting from the negligent act of Gray on the principle of Respondeat Superior. Many of the cases cited by Petitioner concern independent pilots (not towing company employees) making personal contracts to pilot ships having the use of their own propulsion machinery and rudders, and are not here in point. Those cases are no more applicable to the one at bar, than are those such as *Sun Oil v. Dalzell*, having to do with towing companies

furnishing a pilot to assisted vessels using their own propulsion and rudder power.

The District Court and the Court of Appeals, were correct in holding that Captain Gray's status as an employee of G & H Towing Co. was not changed by the so-called pilotage clause so as to render Maritime Overseas Corporation personally liable for Gray's negligent acts, because that clause under the facts of this case was void under the holding of the *Bisso* case.

Petitioner argues that Gray, during this towing operation, must have been a pilot because the Court held him liable in accordance with the high standard of care imposed on pilots. We fail to find such a statement in either Court's opinion. The District Court found Gray negligent (Finding of Fact No. 17, R. 883) "in giving the order to drop the anchor when he should have been aware of the construction of the pipelines from general knowledge, the Notices to Mariners and the prominent warning signs which were plainly visible". Nowhere in this finding is there mention of holding Gray to a high standard of care imposed on pilots or of holding him as an insurer. Any captain in charge of a tow is required to know the prevailing conditions in the waters where his job is performed, and the standard of care imposed on Gray (which was no more than *due* care) was entirely consistent with the circumstances that Gray had been employed by G & H Towing Company in Galveston for 21 years preceding the casualty in question (R. 158), that he had been Port Captain for Petitioner, G & H Towing Company, located in Galveston, since March of 1958, and that in that capacity, as part of his regular job, he was in charge of all dead ship towage operations of G & H Towing Company. Furthermore, in affirming the District Court's find-

ing of Gray's negligence, the Court of Appeals said (287 F. 2d 852, at P. 854):

> "We are holding, though, that it was entirely proper for the District Judge to find, as he did, upon the whole facts, that the proximate cause of the injury sued for was *the failure of Gray to use due care* to find out just where the pipelines were, etc." (Emphasis supplied)

Thus, it was expressly shown that the standard of care required of Gray was only *due* care, and no higher standard, such as that imposed upon a pilot or an insurer, was required of him. Moreover, even if a higher standard of care had been imposed upon Gray by the Court, it could not have changed the nature of the work which he was performing in this instance from towage to pilotage.

The District Court and Court of Appeals have held that this was not a case where the master of the ship should have interfered with one furnished as being competent, in charge of her navigation. As a matter of fact, *the District Court found that Gray gave the order to drop the anchor* and that the master was not negligent for failing to intervene and these findings were approved by the Court of Appeals (Findings of Fact Nos. 21 and 22, R. 884). The pipeline area could have been known only to Captain Gray, certainly not to the ship's master who was a stranger in the port. The master had no knowledge and did not purport to have knowledge of local waters (R. 695). He did not and could not command the tugs as he was not familiar with the signals by which they could be and were directed (R. 715). There was no evidence that Captain Gray, before the accident, having been furnished for this purpose by a

large towing concern, did not know what he was to do, and certainly there was no prior apparent evidence of his misconduct or incompetence. He, not the master or crew of the ship, knew or should have known the port. There was no evidence that the master should have acted differently than he did and the Court so found. Whether or not the master should have intervened and superseded Gray was strictly a question of fact, and one which has been determined on ample evidence contrary to Petitioner's contention.

As was said in the *Caspian* (E.D. Pa. 1925) 14 F. 2d 1006, aff'd. 14 F. 2d 1013, "the test of employment is selection and control". In the case at bar, Emmett Gray had been an employee of Appellant, G & H Towing Co., for twenty-one years. At the time of the casualty, he was employed by G & H Towing Co. as Port Captain. His salary and all moneys which he received for acting as a so-called dead ship pilot were paid to him by G & H Towing Co. (R. 240). He received this towing assignment as well as all other towing assignments from G & H Towing Co., including the names of the ships to be moved, the points from and to which they were to be moved, and the times of the movements (R. 823, 824). This entire movement of the "Har Canaan" was within the sole control of G & H Towing Co. who furnished all propulsion, motive and directional and maneuvering power in the form of the three tugs positioned and navigated solely under the direction of its employee, Captain Emmett Gray. Gray was unknown to, and his services were not requested by Maritime Overseas Corporation, and it did not exercise or attempt to exercise any control over his or the tugs' actions. Under the circumstances, the contention of Petitioner, G & H Towing Co. that Captain Gray

was not its employee, but that of Maritime Overseas Corporation is untenable. The record is replete with competent evidence to the contrary, and the District Court's finding to the contrary, concurred in by the Court of Appeals, forecloses the question.

C. Captain Gray was not a borrowed or loaned servant.

G & H Towing Co., in its petition, Argument, Article III, makes the contention that Gray, while aboard the M/V "Har Canaan", was a borrowed or loaned servant. It is not clear from the petition whether Petitioner is contending that Gray was the borrowed servant of Bay-Houston Towing Company or Maritime Overseas Corporation. In any event, the contention made in this part of the petition that Captain Gray was a borrowed or loaned servant is the same contention, stated in different words, made in other parts of the petition that he was acting as a pilot assisting a self propelled and self manned and maneuvered vessel, and as that contention was decided by the District Court, and affirmed by the Court of Appeals, contrary to Petitioner's position, and was well supported by the evidence, it should be settled so far as this Court is concerned. There is no substance to Petitioner's argument that because the tugs and their owners, as distinguished from their operator (G & H Towing Co.) were dismissed from this action, Gray thereby should be found to have been the borrowed servant of Maritime Overseas Corporation. As a practical matter, Bay-Houston Towing Co., one of the tug owners, and the only company which had the contract with Maritime Overseas Corporation, was never able to perform any towing services under that contract because it did not operate any tug-

boats (Finding of Fact No. 10, R. 880). As G & H Towing Company was the only operator of harbor tugs in the Port of Galveston, and as it automatically supplied Captain Gray to be in charge of the towing operation when it received a request to move a dead ship (R. 726), then in order to get its ship moved within the harbor of Galveston, Maritime Overseas Corporation was obliged to accept Captain Gray along with the tugs. The Galveston Pilots Association, the membership of which was composed entirely of Federal and State licensed pilots, compulsory by state law for ships under registry, did not supply pilots to direct towage operations such as was here involved (R. 823), for the simple and obvious reason that this is a towage service.

All of the cases cited by Petitioner for the proposition that Gray was a loaned or borrowed servant, including *Sun Oil v. Dalzell*, involved true pilotage, i.e., where the ship had the use of her own propulsion and rudder power and was only being assisted by tugs or had no tugs at all, and accordingly, are not in point here. The Court's attention is invited to the fact that in this section of its petition Petitioner has stated, apparently as a fact, that the movements of the M/V "Har Canaan" on the occasion in question were in direct charge of her master, when the record clearly shows that the master did not and could not command the tugs at all (R. 715), and, therefore, could not and did not move the ship in any direction, that Captain Gray had assumed the conning of the vessel (Finding of Fact No. 13, R. 882), and that Captain Gray, not the master, ordered the anchor dropped (Finding of Fact No. 14, R. 882). Finally, the question was entirely foreclosed by the trial judge in his Finding of Fact No. 20 (R. 884), amply supported by the evidence, that "Cap-

tain Gray was acting within the scope and course of his employment by G & H Towing Co. at all times material hereto, and was not a loaned servant to the vessel or her operators at such times."

II.

The Opinion of the Court of Appeals is not in Conflict With that of Any Other Court of Appeals or of this Court in Any Other Case.

Clearly, the opinion of the Court of Appeals in this case is entirely in conformity with the prevailing law as announced by Your Honors in *Bisso v. Inland Waterways Corp.*, the case having been determined on competent evidence as a matter of fact to be one involving towage. The decision is not in conflict with that in *Sun Oil Co. v. Dalzell*, or the cases following it, because those cases involve, as a matter of fact, pilots on vessels being assisted while under their own propulsion power and maneuverability, and not towage. Indeed, there is a marked uniformity in the authorities throughout the country whereby an exculpatory clause, that is a clause purporting to release a party from liability for damages for its own negligence, is held to be invalid as against public policy when towage is involved. This case, having been determined to be one of towage, falls under that line of authority in which the exculpatory clause is held invalid.

However, if this Court should believe that there are facts present in this case which render it substantially distinguishable from the *Bisso* case, and yet do not bring it within the purview of the rule announced in *Sun Oil v. Dalzell*, then it is respectfully submitted that it would be a novel case, and that the law governing in such situation has been determined by the Fifth Circuit Court of

Appeals by its opinion in this case. That opinion, in view of its novelty, would not be in conflict with any other decision of any other Circuit Court of Appeals or of this Court. Accordingly, for this reason, the writ should be refused.

III.

No Public Interest of Importance is here Involved.

Petitioner is endeavoring to have a clause, sometimes held exculpatory in true *pilotage* situations, declared to be effective to relieve a towing company for negligent *towage*. We have been unable to find a case where this was done and Petitioner has cited none. Indeed, in almost all cases now on record, where litigation involving such a pilotage clause has arisen, the clause itself has provided that it is effective when the vessel being assisted had the use of her own propulsion power, or in other words, what we refer to as pilotage cases. Certainly the clause here asserted by Petitioner to be involved is not in wide use, if indeed it is in use in any port except Galveston, Texas. The circumstances that the engines and rudder of the "Har Canaan" were inoperative, combined with the occurrence of a rather freakish accident (the breaking of a poorly marked submarine pipeline by a ship's anchor), occurring in a harbor where a monopoly of harbor towing business existed in favor of a single towing company, gave rise to the issues of cross-liabilities and indemnity in this litigation. The unusual circumstances which gave rise to these issues are not likely to occur with frequency, and would concern only a small segment of the marine industry in isolated instances. Certainly there are no issues here involved which would be of importance to the general American public.

IV.

Inasmuch as the opinions of the District Court and the Court of Appeals were the result of the application of settled legal principles to fact findings amply supported by the evidence, and not clearly erroneous, there are no questions to be passed on by this Court.

The law is clear that on a question of fact this Court will accept the concurrent findings of the District Court and Circuit Court of Appeals supported by substantial evidence. *The "Linseed King"* (N.Y. 1932), 285 U.S. 504; *Graver Tank and Mfg. Co. v. Linde Air Products Co.*, (Ind. 1959) 336 U.S. 271; *Alabama Power Co. v. Ickes* (1938) 302 U.S. 464.

At the risk of being burdensomely repetitious, it is again respectfully pointed out to the Court that the District Court, on well supporting evidence, found, as a matter of fact, that the situation here involved was one of towage, rather than pilotage, and that the exculpatory clause was inapplicable under the facts as they found them. These fact findings were specifically approved by the Court of Appeals. The District Court applied the well settled law, as announced by Your Honors in *Bisso v. Inland Waterways Corp.*, supra, that a tower cannot effectively release himself from liability for negligence of his own employees. The Court of Appeals approved the fact findings and this application of the settled law. This effectively disposes of, and indeed precludes, under the authorities cited above, any further consideration by this Court of the points which Petitioner attempts to raise in this petition.

Conclusion

Maritime Oveaseas Corporation respectfully submits that the judgment of the Court of Appeals, and the judgment of The District Court, are correct; that their holdings are not in conflict with, nor are they in any way contrary to, any prior decision of other Courts of Appeal or of this Court, but are in conformity with such decisions; that the decisions of the District Court and of the Court of Appeals in this case are the result of the application of well settled legal principles to findings of fact amply supported by the evidence; that the case involves no matters of general public interest of importance, and that the decisions are not contrary to any precedents or public interest that require their correction by the exercise of this Court's power of supervision.

Respectfully submitted,

EASTHAM, WATSON,
DALE & FORNEY

CLARENCE S. EASTHAM

By_____

CLARENCE S. EASTHAM
538 Mellie Esperson Building
Houston 2, Texas
Attorneys for Maritime Overseas Corporation

Of Counsel:

CLARENCE S. EASTHAM
ALAN S. DALE

Certificate

I certify that a copy of the foregoing Brief of Maritime Overseas Corporation in opposition to the Petition for Writ of Certiorari of G & H Towing Company, has been mailed to Mr. Robert Eikel, 1910 Tennessee Building, Houston 2, Texas, Attorney for Petitioner, G & H Towing Company and Petitioner, Emmett Gray, Royston, Rayzor & Cook, Cotton Exchange Building, Galveston, Texas, Attorneys for Petitioner, G & H Towing Company, and to McLeod, Mills, Shirley & Alexander, 801 Santa Fe Building, Galveston, Texas, Attorneys for Respondents, Edwin E. Johansson, Kansas City Bridge Company, Merritt-Chapman & Scott Corp., and Pelican Island Development Corporation, this 22nd day of August, 1961.

CLARENCE S. EASTHAM

CLARENCE S. EASTHAM